88-1245

No.

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO.

HARRY DuCHESNE, PETITIONER

v.

WYLIE WILLIAMS, JR. AND
THE CITY OF INKSTER

RESPONSE OF CITY OF INKSTER AND WYLIE L. WILLIAMS, JR. TO PETITION FOR WRIT OF CERTIORARI

Marilyn A. Madorsky, Esq.
Milton Spokojny, Esq.
Attorney for Respondent
4000 Town Center, Suite 1240
Southfield, Michigan 48075
(313) 352-9080

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether procedural due process rights of a public employee are violated when a pre-termination hearing is held before the supervisory official partially responsible for the charges brought against him.

TABLE OF CONTENTS

	Page
Counter Statement of Questions Presented	2
Opinions Below.	7
Jurisdiction.	8
Constitutional Provisions	8
Statement of the Case	8
Argument.	14

TABLE OF AUTHORITIES

Page

Cases:

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (135) 6, 17, 18, 19

Matthews v. Eldridge, 424 U.S. at 343. 16

Constitution, statutes, and regulation:

Fourteenth Amendment 8

BOCA (Building Officials and Code Administrators International, Inc.) National Building Code/ 1981, Sec. 109.2. . . . . .14, 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO.

HARRY DuCHESNE, PETITIONER

v.

WYLIE WILLIAMS, JR. AND THE CITY OF INKSTER

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Marilyn A. Madorsky and Milton Spokojny on behalf of The City of Inkster and Wylie Williams, Jr. hereby respond to the Petition filed in this Court seeking review of the en banc decision of the Sixth Circuit Court of Appeals sought by Harry DuChesne.

Respondent submits that the Petitioner has presented no grounds upon

which this Court should entertain jurisdiction of this matter. Indeed, the en banc decision of the Court of Appeals is in keeping with this Court's decision in Cleveland Board of Education v Loudermill, 470 U.S. 532 (1985). Petitioner brings no new issue, nor compelling reasoning to this Court's attention. Respondent urges that the Petition be denied.

OPINIONS BELOW

The opinion of which review is sought appears at 849 F2d 1004.

The opinion of the original panel was withdrawn from publication, and the District Court's opinion was not reported. Both appear in Appendices to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner has invoked this Court's jurisdiction under 28 U.S.C. 1254(1). Respondent submits that the Writ is untimely based upon the entry of an order denying a Petition for Rehearing on July 22, 1988.

CONSTITUTIONAL PROVISIONS

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The Defendant, City of Inkster, is a municipality, chartered and incorporated in the State of Michigan. The Plaintiff, Harry Duchesne, served as a building inspector for the City at the time of his

termination. He was hired as an inspector in 1982 and terminated in 1983.

At the time of Plaintiff's termination from employment with the City of Inkster, the Defendant Wylie Williams, was the City Manager.

Almost from the start Mr. Duchesne's performance in his job was unsatisfactory. A probationary period was imposed in April, 1983 and again in July, 1983 in order to give him notice of the dissatisfaction of his superiors. On September 12, 1983, Mr. Duchesne was discharged for the stated reasons of "unsatisfactory performance during a probation period, failure to meet agreed deadlines, improper conduct before city council (slanderous remarks), a pattern of insubordination and unwillingness to accept direction from

city supervisors". The effort to correct Mr. Duchesne's job deficiencies had been a continuing one. In September the City Manager provided Mr. Duchesne with fifteen (15) specific items of insufficiency which justified his termination. After discussion, several of those items were withdrawn by mutual agreement (primarily the slanderous remarks at city council meetings).

A hearing was afforded Mr. Duchesne relative to his termination. The City Manager conducted the hearing. The proceedings were held over a period of three (3) days, October 6, 17 and November 10, 1983.

On November 18, 1983 the City Manager terminated Mr. Duchesne pursuant to the hearing.

This case was filed originally

seeking a temporary restraining order, which was denied. Claims of due process violation and first amendment violation were pled along with state law wrongful discharge claims. The Trial Court acted on Plaintiff's Motion for Summary Judgment on the due process claim only, by order of July 25, 1985. The Court determined that Plaintiff had been denied due process when he was discharged pursuant to a pre-termination hearing where his supervisor and the charging party, Wylie Williams, also acted as hearing officer.

Plaintiff subsequently filed a "Motion to Determine a Remedy" and on October 7, 1985, the Trial Court issued an order remanding the matter for a pre-termination hearing before a hearing officer to be determined by agreement of

the parties; the Court also ordered full back pay and reinstatement to current salary benefits.

The City of Inkster and Mr. Williams appealed from these injunctive orders of October 7, 1985, redetermined on November 21, 1985, pursuant to 28 USC 1292.

On June 16, 1987 a panel of the Sixth Circuit Court of Appeals decided the case and affirmed the District Court. This opinion was vacated by order of the Court and on June 20, 1988 the en banc Court reversed the Judgment of the District Court and vacated and dissolved the injunctions issued. A Petition for Rehearing by Duchesne was denied on July 22, 1988. The mandate was issued on August 1, 1988.

The matter was remanded to the District Court for further proceedings,

and a Motion for Summary Judgment is currently pending based upon "post termination" due process claims. The Court of Appeals based its decision upon a pre-termination due process analysis, only.

ARGUMENT

Harry Duchesne, a building inspector in the City of Inkster, was charged with misconduct and unsatisfactory performance in his job and told that he would be discharged. Mr. Duchesne demanded a hearing pursuant to the Building Officials and Code Administrators International, Inc. (BOCA) National Building Code of 1981 which he claimed was applicable to his employment. In response to Mr. Duchesne's request a hearing was given.

The ordinance in question provides in relevant part:

> The code official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority. BOCA Code, Rule 109.2.

In the City of Inkster, Wylie L. Williams, Jr., then the City Manager, was the appointing authority who had hired Mr. Duchesne. A hearing was scheduled before the City Manager pursuant to BOCA Code Rule 109.2.

Plaintiff who relied on BOCA Code Section 109.2 in his demand for hearing then objected. The City maintains that under the circumstances, Mr. Duchesne received all of the process due to him.

Most basic to any formulation of a due process discussion, is that due process requires, in its essence, notice and opportunity to respond. Mr. Duchesne was provided with far more than these basic requirements.

The hearing held with respect to Mr. Duchesne's discharge took place over the course of three separate days of hearing,

at which he was represented by counsel, at which a record was kept, and at which he had a full opportunity to respond to each and every charge made against him, to confront and cross-examine witnesses, and to make argument.

Once the proposition that Mr. Duchesne had a right to a hearing is accepted, (here only for the sake of argument) one must only determine the extent of process to which Mr. Duchesne is entitled. This Court has made it clear that in a pre-termination setting, the due process requirement is satisfied by a limited opportunity to respond.

> In general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action. Matthews v Eldridge, 424 U.S. at 343.

* * *

> The essential requirements of due process that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to state reasons, either in person or in writing, why proposed action should not be taken, is a fundamental due process requirement. Cleveland Board of Education v Loudermill, 470 U.S. 532 (1985).

In Loudermill, it was determined that all the process that was due to Mr. Loudermill, who made his claim of property right pursuant to Ohio Statute, was a pre-termination opportunity to respond.

Nowhere in Loudermill, does this Court require that an unbiased decision maker be imported for this purpose.

Certainly, it is inherent in every employment situation, that the employer who is presented with the competing grounds for discharge by the employee and his supervisor must have some bias. If the petitioner's claim that an unbiased decision maker must be provided is adopted, then each pre-termination hearing will require the retention of an outside unbiased party, whose interest in the matter cannot be questioned. Such expense and burden is not warranted by this Court's decision in Loudermill.

Indeed, the essence of Loudermill is that pre-termination remedies are simple and straight forward, a check against mistake, without undue formality.

The Court relies on post-termination remedies, such as those which were available to Mr. Duchesne, including a

hearing before the Civil Service Commission, and the civil remedy of a breach of contract lawsuit available in the Michigan Court for wrongful discharge, to protect the employee in the more factually sensitive cases.

The Petitioner has failed to show any way in which the en banc decision of the Sixth Circuit Court of Appeals departs from this Court's holding in Cleveland Board of Education v Loudermill, 470 U.S. 532 (1985) and the petition should be denied.

PROVIZER, LICHTENSTEIN
PEARLMAN & PHILLIPS, P.C.

By: _____
MARILYN A. MADORSKY (P32417)
Attorney for Appellants
4000 Town Center, Suite 1240
Southfield, Michigan 48075
(313) 352-9080

Dated: February 22, 1989

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO.

HARRY DuCHESNE, PETITIONER

v.

WYLIE WILLIAMS, JR. AND
THE CITY OF INKSTER

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss:
COUNTY OF OAKLAND)

MAGGIE WUNDERLICH, being first duly sworn, deposes and says that she is employed by PROVIZER, LICHTENSTEIN, PEARLMAN & PHILLIPS, P.C.; that on the 22nd day of February, 1989, she served a copy ofResponse of City of Inkster and Wylie L. Williams, Jr. to Petition for

Writ of Certiorari upon:

Gary R. Rentrop, Esq.
Susan E. Morrison, Esq.
74 E. Long Lake Road
2nd Floor
Bloomfield Hills, Michigan
48013

Milton Spokojny, Esq.
6735 Telegraph Road
Ste. 320
Birmingham, Michigan 48010

by placing same in envelopes, first-class postage prepaid, addressed as above, and depositing same in the United States Mail.

Maggie Wunderlich

Subscribed and sworn to before me
this 22nd day of February, 1989

Catherine P. Settle

Catherine P. Settle, Notary Public
Oakland County, Michigan
My Commission Expires: 6/30/91